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No. —— 00 746

IN THE

Supreme Court of the United States

STATE OF MICHIGAN, *et al.*,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The D.C. Circuit held that the U.S. Environmental Protection Agency (EPA) reasonably defined the term "reservation" in the Clean Air Act (CAA) as including lands, located outside the boundaries of formal reservations, which are taken into trust for tribes pursuant to the Indian Reorganization Act (IRA). As a consequence, tribes are now authorized to redesignate under CAA § 164(c) such current and future trust lands to a more stringent air quality classification, an action that can override the implementation by a state of its own land use development policies, preclude construction of new industrial facilities, and impose costly restrictions on the operation of existing facilities in state lands bordering the redesignated tribal lands. The court also held that the CAA expressly delegates to tribes authority to adopt air programs for lands within reservations that are owned in fee by non-Indians and that were subject to state air quality regulation prior to the 1990 Amendments to the CAA. The questions presented are:

1. Whether EPA has the discretion to interpret the CAA in a manner that expands the lands tribes may redesignate to include IRA trust lands and other lands located outside of reservations established by treaty, Executive Order, or Act of Congress.

2. Whether the CAA can be construed as divesting the states of their sovereign authority by delegating authority to tribes over non-Indian fee lands previously within the sovereign jurisdiction of a state, when the CAA expressly provides that no provision therein precludes or denies a state's authority to adopt and enforce standards for lands within its territorial boundaries.

PARTIES TO THE PROCEEDINGS

1. The following were petitioners in the consolidated proceeding, the judgment in which review is sought, and who join in this petition.

In No. 98-1203, the National Association of Manufacturers, the Michigan Chemical Council, the Timber Producers Association of Michigan and Wisconsin, Inc., and the Rhinelander Area Chamber of Commerce, Inc. (hereinafter, the National Association of Manufacturers, *et al.*).

In No. 98-1207, Salt River Project Agricultural Improvement and Power District (in its capacity as operating agent for the Navajo Generating Station), and Public Service Company of New Mexico.

2. The following were petitioners in the consolidated proceeding, the judgment in which review is sought, and who do not join in this petition.

In No. 98-1196, Arizona Public Service Company.

In No. 98-1203, the American Forest & Paper Association.

In No. 98-1206, the National Mining Association.

In No. 98-1207, Nevada Power Company, and Tucson Electric Power Company.

In No. 98-1208, Oklahoma Gas & Electric Company.

3. The following was respondent in the consolidated proceeding, the judgment in which review is sought.

United States Environmental Protection Agency.

4. The following were intervenors in the consolidated proceeding, the judgment in which review is sought, and who join in this petition.

The State of Michigan.

5. The following were intervenors in the consolidated proceeding, the judgment in which review is sought, and who do not join in this petition.

Central and South West Services, Inc.
Gila River Indian Community.
Navajo Nation.
Salt River Pima-Maricopa Indian Community.
Shoshone-Bannock Tribes.

DISCLOSURE STATEMENT

No parent corporation or publicly held company owns 10% or more of either Salt River Project Agricultural Improvement and Power District or Public Service Company of New Mexico. The National Association of Manufacturers, *et al.*, are each a trade association and none of these entities is a parent, subsidiary, or affiliate of any corporation or other entity which has issued shares or debt securities to the public.

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PETITION FOR A WRIT OF CERTIORARI

The State of Michigan, Salt River Project Agricultural Improvement and Power District, Public Service Company of New Mexico, and the National Association of Manufacturers, *et al.*, (Petitioners) respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in *Arizona Public Service Co., Inc., et al. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000).

OPINION BELOW

The opinion of the court of appeals (App. 1a-49a) is reported at 211 F.3d 1280, 341 U.S. App. D.C. 222. The orders on the petitions for panel and *en banc* rehearing and the court of appeals' mandate are included in the Appendix (App. 135a-140a).

JURISDICTION

The court of appeals entered its judgment on May 5, 2000. Timely petitions for panel and *en banc* rehearing were denied by orders of the court of appeals entered on July 12, 2000. The court's mandate issued on July 27, 2000. On September 27, 2000, the Circuit Justice for the District of Columbia Circuit extended the deadline for the filing of the instant petition to and including November 9, 2000. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED IN THE CASE

This case involves portions of the Clean Air Act §§ 110, 164, and 301 (App. 141a-147a), the Indian Reorganization Act, §§ 461 and 465 (App. 148a-149a), and

the Tribal Authority Rule, 63 Fed. Reg. 7254 *et seq.*, and 40 C.F.R. Part 49 (App. 50a-134a).

STATEMENT OF THE CASE

This case presents important issues involving federal Indian law and the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* (CAA or the Act) that are of national importance. In its decision below, the D.C. Circuit has fundamentally rearranged the balance of state and tribal jurisdiction. The court's unprecedented decision permits tribes to exercise CAA authority over not only lands that had been formally established as tribal reservation lands at the time the CAA was enacted, but also over lands that are taken into trust for the benefit of the tribes by the U.S. Secretary of the Interior pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.* (IRA). Lands taken into trust under the IRA can include territory within a state that had always previously been within the state's sovereign jurisdiction. The decision below has thereby exacerbated the tensions that have long existed between states protective of their sovereign authority and tribes anxious to expand the scope of the territory within their control.

Some historical background is necessary in order to understand the disruptive potential of the decision below. Under a later-abandoned policy of assimilation, the Indian General Allotment Act of 1887, 25 U.S.C. §§ 331 *et seq.*, commonly known as the Dawes Act, encouraged the alienation of tribal reservation lands, with patents in fee being issued to individual Indian allottees. Much of this fee land was later sold to non-Indians. The Dawes Act also permitted lands within reservations which were not allotted to individual Indians to be opened to non-Indian settlement.

Beginning in 1934, the IRA put an end to the further alienation of tribal lands. IRA § 1, App. 148a. The IRA did not, however, automatically restore to tribes the millions of

acres of land which had been sold to non-Indians over the course of the preceding 50 years. Consequently, tribal reservations are to this day marked by a checkerboard pattern in which tracts of land held in fee by non-Indians are interspersed throughout tribal reservations. In some cases, large portions of the lands within a tribal reservation may be owned by non-Indians. *See, e.g., Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1016 (8th Cir. 1999) (approximately half of reservation land area held in fee by non-Indians).

The question of who may exercise civil jurisdiction over these non-Indian fee lands located within the exterior boundaries of reservations – the state or the tribe? – has long been a contentious one. Lands located within reservation boundaries, although held in fee by non-Indians, retain their character under federal law as "Indian country."[1] Tribes generally exercise civil jurisdiction, to the exclusion of the states, over "Indian country," except where such authority has been granted to a state by treaty or Act of Congress. *See*,

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[1] "Indian country" is defined at 18 U.S.C. § 1151. In relevant part, the statute provides the term means

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Although relating by its terms only to federal criminal jurisdiction, this definition also generally applies to questions of civil jurisdiction. *See, e.g., DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 427 n.2 (1975).

e.g., *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164 (1973).

At the same time, sharp limits exist on the authority of tribes to regulate the conduct of non-Indians within reservation boundaries, where the conduct in question occurs on lands held in fee by non-Indians. The general rule, as expressed by this Court in *Montana v. U.S.*, 450 U.S. 544 (1981), holds that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes," and so "cannot survive without *express congressional delegation*." 450 U.S. at 564 (emphasis added).[2]

Lands taken into trust under the IRA create a further complication. While the IRA did not directly restore to tribes the lands alienated during the Dawes Act era, it does authorize the U.S. Secretary of the Interior to acquire on behalf of tribes "any interest in lands, . . . within or without existing reservations," title to which is to be "taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired." IRA § 5, App. 148a-149a. Under the IRA, the Secretary may, without any apparent guidance from Congress as to the scope of his discretion, take into trust lands acquired for tribes by the federal government or acquired by the tribes themselves. This includes parcels of land, both large and small, that a

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[2] The Court also recognized, however, in what has become known as the "second exception" to *Montana*'s general rule, that a tribe "may . . . retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation" when that conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566.

tribe might purchase *outside* the boundaries of its reservation.[3]

While, on its face, IRA § 5 merely provides that lands taken into trust "shall be exempt from State and local taxation," the U.S. Department of the Interior and lower courts have generally assumed that such trust lands take on the full character of "Indian country" within the meaning of 18 U.S.C. § 1151.[4] Under this assumption, the IRA operates as a mechanism by which not only tribal lands lost to the assimilationist policies of the Dawes Act era, but also lands that, as a historical matter, have *never* been within tribal control, can be removed from the jurisdiction of the state.

This feature of the IRA, by which a state can presumptively be divested of its sovereign jurisdiction with respect to lands over which is previously possessed control, through an unbounded discretionary act by a federal department, has not escaped challenge. In *South Dakota v. U.S. Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995), IRA § 5 was struck down as an "unconstitutional delegation of legislative power." The Interior Department subsequently petitioned for, and was granted, certiorari by this Court, but before hearing the case on the merits the Court vacated the Eight Circuit's decision and remanded for reconsideration in light of an assertedly-changed Department position. *See U.S. Dep't of Interior v. South Dakota*, 519 U.S. 919 (1996).[5]

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[3] Some tracts of this trust land can be quite small (*e.g.*, no more than an urban house lot), and lands held in trust are often mingled with lands owned in fee by both Indians and non-Indians alike. *See, e.g.*, Comments of the State of Oklahoma, Department of Environmental Quality, Regarding Indian Tribes Air Quality Planning and Management (Nov. 23, 1994), EPA Air Docket No. A-93-3087, IV-D-48, at 1.

[4] *See, e.g.*, 64 Fed. Reg. 17,578 (April 12, 1999); *see also Connecticut v. Blumenthal*, 228 F.3d 82 (2nd Cir. 2000).

[5] Justice Scalia, joined by Justices O'Connor and Thomas, dissented from the Court's action.

It is against this backdrop of complex Indian law issues that Congress has legislated to permit tribes to exercise a measure of authority over air resources on lands falling within tribal jurisdiction. Shortly after passage of the Clean Air Act in 1970, EPA promulgated regulations designed to "prevent the significant deterioration" of the air quality in areas cleaner than required by the national ambient air quality standards (NAAQS). Among the features of these "PSD" regulations, 39 Fed. Reg. 42,510 (Dec. 5, 1974), all areas of the country that had cleaner air than required by the NAAQS were to be designated as "Class I," "Class II," or "Class III."

All such areas were initially designated as Class II, under which a moderate amount of deterioration in air quality was to be permitted. The PSD regulations further provided that areas could be *redesignated* to either Class I, under which very little deterioration would be allowed for both the area in question *and* for lands located considerable distances from the area, or to Class III, under which the quality of the air would be permitted to deteriorate up to the levels specified by the NAAQS.

EPA in the 1974 PSD rulemaking afforded tribes a limited measure of authority to regulate air quality on their own lands, by providing that tribes as well as states could make redesignations. Specifically, the 1974 PSD regulations provided, in pertinent part, that "[w]here a State has not assumed jurisdiction over an Indian Reservation the appropriate Indian Governing Body may submit to the Administrator a proposal to redesignate areas Class I, Class II, or Class III." 40 C.F.R. § 52.21(c)(3)(v) (1974).

Notably, a tribe's redesignation authority under the 1974 PSD regulations did not extend to the entirety of "Indian country," but only to an "Indian Reservation." EPA defined that term to mean "any federally-recognized reservation *established by Treaty, Agreement, Executive Order, or Act of Congress.*" 40 C.F.R. § 52.21(b)(4)(1974) (emphasis added). This definition thus incorporated the full

range of political mechanisms by which public lands have been "reserved" for the benefit of Indian tribes by direct action of Congress or the President over the course of the country's history. *See, e.g., Sioux Tribe of Indians v. U.S.*, 94 Ct.Cl. 150, 170 (1941), *aff'd* 316 U.S. 317 (1942) (Observing that there are "three kinds of Indian reservations: those which are created by treaties previous to 1871; those which have been created by acts of Congress since 1871; and those made by Executive Orders whereby the President has set apart public lands for the use of the Indians in order to keep them within a certain territory.").[6]

In 1977, Congress made significant revisions to the CAA. Among other things, the 1977 CAA Amendments codified, with certain changes, EPA's 1974 PSD regulations, retaining the basic structure of EPA's classification scheme for those areas of the country whose air was cleaner than required by the NAAQS. As had been the case under the 1974 PSD regulations, an area's designation established the maximum degree to which concentrations of various regulated pollutants over baseline levels, known as "increments," would be permitted to increase in that area. Under CAA § 163(b), the increments for Class I were made four to 10 times more stringent than the corresponding Class II increments.

In turn, CAA § 161 required that "each applicable implementation plan" contain "emission limitations and such other measures as may be necessary" to prevent significant

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[6] The creation of Indian reservations through treaties was ended by Congress in 1871. *See* 25 U.S.C. § 71. When formal treaty making was abandoned, the federal government continued to make agreements with Indian tribes, which agreements were similar to treaties but which required approval by both houses of Congress. *See generally* Felix S. Cohen, Handbook of Federal Indian Law (1982 ed.) at 105-07. Congress prohibited the creation of further "Executive Order reservations" in 1919. *See* 43 U.S.C. § 150; *see also* 25 U.S.C. § 398d.

deterioration of the air quality in *any* clean air area. As a consequence, redesignation has an immediate impact on nearby facilities regulated under the CAA, with additional controls or even shutdown being required if necessary in order to protect a Class I area's more stringent increments.

In 1977, Congress initially designated the entire geographic area of the country as Class II (with the exception of specified parks of a certain size, which were permanently designated Class I). CAA§ 162. At the same time, pursuant to CAA § 164(a), states were authorized to redesignate the balance of the lands within their borders as either Class I or as Class III, with one significant exception: CAA § 164(c) specified that "[l]ands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body." App. 144a-145a.

Thus, Congress expressly delegated to tribes authority to redesignate their reservations, as they had previously been permitted to do by EPA in its 1974 PSD regulations.[7] While the 1977 Amendments did not include a statutory definition for the term "reservation," the Amendments were adopted against the backdrop of the 1974 PSD regulations. As a result, following enactment of the 1977 Amendments, EPA continued to define "reservation" to mean a federally-recognized reservation "established by Treaty, Agreement, Executive Order, or Act of Congress." *See* 40 C.F.R. § 52.21 (b)(15) (1978); 43 Fed. Reg. 26,404 (June 19, 1978).

Congress did not undertake another major revision to the CAA until 1990. At that time, EPA was directed to "promulgate regulations . . . specifying those provisions" of

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[7] Both states and tribes were afforded unlimited discretion in making their redesignation decisions, with EPA being authorized to disapprove a redesignation request only where certain procedural requirements have not been met. *See* CAA § 164(b)(2), App. 144a.

the CAA "for which it is appropriate to treat Indian tribes as States," with such treatment of a given tribe being authorized under the Act "only if" certain specified conditions are met. CAA § 301(d)(2), App. 146a-147a. Among other things, the "functions to be exercised" by the tribe have to "pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." CAA § 301(d)(2)(B), App. 147a.

In addition, the Agency was also authorized, although not required, to "promulgate regulations which establish the elements of tribal implementation plans," or TIPs. CAA § 301(d)(3), App. 147a. Under CAA § 110(o), when a TIP "becomes effective in accordance with the regulations promulgated" under CAA § 301(d), the TIP will "become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation." App. 141a.

The 1990 CAA Amendments made no changes to the tribal redesignation provisions in CAA § 164(c). And while the term "reservation" was used throughout the new "treatment as States" provisions, as in 1977, Congress found it unnecessary to provide a statutory definition of the term to supplant EPA's existing regulatory definition.

On February 12, 1998, EPA promulgated the regulations required under CAA § 301(d)(2). 63 Fed. Reg. 7254; 40 C.F.R. Part 49, App. 50a-134a. Known collectively as the Tribal Authority Rule, or TAR, the new regulations were intended by EPA to have broad effect, in three fundamental respects.

First, the Agency construed the "treatment as States" provisions of the 1990 CAA Amendments as constituting an "express delegation" by Congress to "address conduct relating to air quality on all lands, including non-Indian-owned fee lands, within the exterior boundaries of a

reservation." 63 Fed. Reg. 7254, App. 54a. EPA discerned this "express delegation" in the language of CAA § 301(d)(2)(B). In EPA's view, the "most plausible reading of the phrase 'within . . . the reservation or other areas within the tribe's jurisdiction' is that Congress intended to grant to an eligible tribe jurisdiction over its reservation without requiring the tribe to demonstrate its own jurisdiction," but to "require a tribe to demonstrate jurisdiction over any other areas, i.e., non-reservation areas, over which it seeks to implement a CAA program." 63 Fed. Reg. 7255, App. 56a.

Second, EPA defined "Indian Reservation," for purposes of the TAR, as the Agency viewed that term as being defined in the "Indian country" statute. *Compare* 40 C.F.R. § 49.2(b), App. 121a, *with* 18 U.S.C. § 1151(a). The Agency explained that, under this definition, "trust lands that have been validly set apart for the use of a tribe even though the land has not been formally designated as a reservation" would be considered as "reservation" land for CAA purposes. 63 Fed. Reg. 7258, App. 67a. As a consequence, tribes would be authorized not only to develop TIPs that covered these off-reservation trust lands, but also to redesignate such lands under CAA § 164(c), even though they had never been established as reservation lands by "Treaty, Agreement, Executive Order, or Act of Congress."

Third, EPA construed the "treatment as States" provisions as authorizing it to promulgate regulations that allowed tribes to exercise authority not only over reservation lands, but also to "develop and implement tribal air quality programs in non-reservation areas that are determined" by EPA as being "within the tribe's jurisdiction." 63 Fed. Reg. 7258, App. 70a. In other words, under the TAR, a tribe would be permitted to adopt TIPs and make CAA § 164(c) redesignations for lands located *outside* the exterior boundaries of reservations, upon the tribe's demonstrating "inherent" jurisdiction over such lands under the "second exception" to *Montana*.

On review, the D.C. Circuit upheld the TAR. A *majority of the panel (Judges Edwards and Rogers)* agreed with EPA that the language of CAA § 301(d)(2)(B) constituted an "express delegation" of authority from Congress to tribes of the authority to regulate air quality over all lands within the exterior boundaries of reservations, including non-Indian fee lands. 211 F.3d at 1288-92, App. 11a-21a.[8]

Further, the panel upheld EPA's definition of "reservation" to include off-reservation IRA trust lands. The panel, noting that "reservation" was not an expressly defined term under the CAA, ignoring the legislative and regulatory history of the term under the Act, and relying on the dictionary alone, determined that the term "surely encompasses both trust lands and formally designated reservations." 211 F.3d at 1293, App. 23a. From this, the panel concluded, based on this Court's decision in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), and follow-on decisions by lower courts, that is could not "condemn as unreasonable EPA's interpretation" of "reservation" to include off-reservation trust lands. 211 F.3d at 1294, App. 25a-26a.

Finally, the panel upheld EPA's reading of the CAA as allowing tribes to adopt TIPs, and make CAA § 164(c) redesignations, for those lands located *outside* the exterior boundaries of reservations over which the tribes could demonstrate jurisdiction. Rejecting petitioners' claim that

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[8] Dissenting from this portion of the opinion, Judge Ginsburg rejected the majority's finding of an "express delegation" in CAA § 301(d)(2)(B), pointing instead to the language of CAA § 110(o) as constituting such a delegation, but only with respect to tribes' authority to adopt TIPs that covered all lands, including non-Indian fee lands, within the exterior boundaries of reservations. Judge Ginsburg found no express delegation as to other CAA programs. 211 F.3d at 1300-05, App. 38a-48a.

both CAA §§ 110(o) and 164(c), by their plain terms, imposed geographical limitations on the scope of tribal authority, the panel found EPA's reading of the Act to be "undoubtedly" reasonable. 211 F.3d at 1295, App. 26a-28a.

The D.C. Circuit subsequently denied petitions for panel and *en banc* rehearing. App. 135a-138a.

REASONS FOR GRANTING THE PETITION

The D.C. Circuit's decision affirms a legislative rule that will govern all future approvals of tribal redesignations and TIP programs under the CAA. Under the judicial review structure of the CAA, no future conflict in the federal Circuits on the questions presented in this petition could be created.[9] Accordingly, this is the only opportunity for this Court to resolve the important questions presented in this petition.

The D.C. Circuit's decision has occasioned an unlikely convergence of two remarkable, and heretofore unrelated, provisions of federal law. The consequences of this convergence, which profoundly alters the balance of sovereign authority between states and tribes with respect to lands within their respective jurisdictions, provide compelling reasons for granting this petition.

The first of these provisions is CAA § 164, which permits both the states and the tribes, in the exercise of absolute discretion, to redesignate their lands to a more stringent air quality classification. Redesignation can restrict the level of growth and development in not only the area redesignated to Class I, but also in lands many miles distant

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[9] Under CAA § 307(b)(1), the D.C. Circuit has exclusive jurisdiction to review legislative rules of national applicability like the TAR. As a result, no other court of appeals can pass on the validity of the TAR, or question the interpretations of the CAA contained therein.

from the redesignated area, *including lands of another sovereign that borders the redesignated lands.*

Second is IRA § 5, which authorizes the U.S. Secretary of the Interior, through administrative action subject to neither the review nor the approval of Congress, to acquire lands and hold them in trust for the benefit of an Indian tribe. By defining "reservation" to include such trust lands located outside the boundaries of reservations formally established by treaty, Executive Order, or Act of Congress, EPA has effectively stripped from the states the authority they previously possessed to redesignate these off-reservation lands. At the same time, tribes are now permitted to redesignate those lands. The radical result is to allow tribes the unilateral authority to constrain, if not stop altogether, growth and development by non-Indians in lands under state jurisdiction miles distant from tribal lands.

By upholding EPA's decision to construe "reservation" lands as including trust lands under the IRA, which can exist in small pockets interspersed with non-Indian lands and which are proliferating each year, the D.C. Circuit has handed to tribes an extraordinary and ever-increasing power over non-Indians on non-tribal lands. This is unprecedented in law.

The decision below also works to divest states of their authority over territory previously within their sovereign jurisdiction by construing the "treatment as states" provisions of the 1990 CAA Amendments as constituting a rare express delegation of authority to tribes over reservation lands held in fee by non-Indians. This ruling too raises a significant issue of tribal authority over non-Indian activity. It ignores the express terms of the CAA, providing that the Act can never be construed as taking from the states their sovereign authority to regulate air quality within their own borders.

I. Certiorari Should Be Granted to Determine Whether EPA Has Discretion to Construe the CAA to Give Tribes Authority to Expand the Lands Over Which They May Exercise Redesignation Power With Extraterritorial Effect, and to Resolve a Split in the Circuits Regarding This Issue.

The authority that the CAA grants to states and tribes to redesignate clean air areas within their respective jurisdictions to Class I is already a remarkable one. Redesignation of an area to Class I can automatically preclude any economic development not only within the area that has been redesignated, but also within lands located miles distant from that area.[10] Under EPA regulations and guidance implementing CAA § 165, EPA has recognized that new or existing major sources located as far as 100 kilometers (approximately 62 miles) from the outer boundary of a Class I area may affect the Class I increments.[11]

Redesignation thus affords both states and tribes extraterritorial jurisdiction to effect control over activities – including the construction of new pollution-generating facilities and the continued operation of such facilities

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[10] *See, e.g., Kerr-McGee Chemical Corp. v. U.S. Dep't of Interior*, 709 F.2d 597, 599 n.1 (9th Cir. 1983).

[11] *See, e.g.*, 40 C.F.R. § 52.21(p); EPA New Source Review Workshop Manual, October 1990, at E.16 ("The meaning of the term 'may affect' [in CAA § 165(d)] is interpreted by EPA policy to include all major sources or major modifications which propose to locate within 100 kilometers (km) of a Class I area."). EPA has more recently proposed that permit information received from sources proposing to locate or to construct a major source modification up to 250 kilometers (155 miles) away, be input into a database which can then be accessed by a Class I tribal air quality manager. *See* 61 Fed. Reg. 38,287-288 (July 23, 1996).

already in existence – occurring great distances *outside* the states' and *outside* the tribes' respective jurisdictions. There is perhaps no other provision of federal law that allows sovereigns to wield extraterritorial power without any substantive standards to guide the exercise of that power.

As it happens, in the over 20 years they have had the power to do so under CAA § 164(a), no state has chosen to redesignate any portion of the lands within its borders. Tribes, on the other hand, have not been as reticent. Since 1977, six tribes have sought redesignation of their lands to Class I. In all but the most recent case, discussed below, the lands for which the tribe at issue sought redesignation were indisputably lands within the boundaries of a reservation established by treaty, Executive Order, or Act of Congress.[12]

Under the decision below, however, any parcel of land acquired by a tribe and taken into trust by the Secretary of the Interior pursuant to IRA § 5 will now be considered "reservation" land that, at the absolute discretion of the tribe, can be redesignated to Class I. This is true even for parcels located nowhere near a formal reservation. Further, regulated facilities located many miles from such redesignated trust lands, including facilities owned by non-Indians located on lands under state jurisdiction, could be forced to change the nature or scope of their operations, install prohibitively-expensive pollution controls, or even shut down, if air quality modeling indicates that this is necessary in order to protect the Class I increments for the tribe's redesignated trust land.

Consequently, this process affords tribal governments unbridled ability to impose Class I standards affecting vast areas of a sovereign state, even over that state's objection. As a result, state-planned growth in geographic areas under sovereign state jurisdiction could be restricted or prohibited

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[12] *See generally* Ann Juliano, *Redesignating Tribal Trust Land under Section 164(c) of the Clean Air Act*, 35 Tulsa L.J. 37 (Fall 1999).

altogether. The development and implementation of urban and industrial land use policy by state and local governments, which have not only the authority but the duty to manage their respective state and local resources, would be undermined.

Unless this Court intervenes, states will be powerless to do anything about this geographic expansion and exercise of tribal authority. Tribes can buy up lands available for sale on the open market, and states cannot preclude the Secretary of the Interior from taking such lands into trust pursuant to IRA § 5. Under the IRA, the Secretary's decision is effectively committed to his discretion, as the Eighth Circuit recognized in *South Dakota v. U.S. Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995), *vacated* 519 U.S. 919 (1996). And once the tribe proposes to redesignate a parcel, EPA *must* approve the request, if the tribe's proposal otherwise meets certain procedural requirements. CAA § 164(b)(2), App. 144a.

These are among the consequences that stem directly from the D.C. Circuit's twin findings that, as used in the CAA, the term "reservation" was ambiguous, and that EPA's new regulatory definition was a "reasonable" exercise of the Agency's rulemaking authority under the second prong of *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In both respects, the court erred.

To begin with, the D.C. Circuit failed to discern any specific congressional intent with respect to the term "reservation" in the CAA only because the court made no real effort to look for it. The court's analysis, under the first prong of *Chevron*, consisted of little more than a determination that "reservation" was not an expressly defined term under the CAA. Finding no statutory definition, the court relied on the dictionary, rather than the relevant legislative and regulatory history of the term under the CAA, in concluding that the term, as used in the Act, was ambiguous. App. 22a-24a.

It is not the dictionary, however, that determines whether "reservation," as used in the CAA, is ambiguous. Under *Chevron*, the inquiry must focus on Congress's – not Webster's – understanding of the term. Far from creating an "ambiguity" as to the term's meaning, the absence of a specific definition of "reservation" in the CAA in fact reflects congressional recognition of how the term has historically been understood: *i.e.*, territory set apart for the benefit of tribes by treaty, Executive Order, or Act of Congress. *See* pp. 6-7 & n. 6, *supra*.

When it first used the term "reservation" in the 1977 Amendments, Congress was aware that EPA had previously defined the term in its 1974 PSD regulations to mean lands set apart by treaty, Executive Order, or Act of Congress. The legislative history of the 1977 Amendments confirms that Congress was neither enlarging nor diminishing the lands that tribes could redesignate. For instance, during debate in the House over the Conference Report, the floor manager explained that, in codifying the then-existing regulatory program, the "conference bill provides that both States and Indian tribes *will continue to have the power they now have* to redesignate their lands to a new air quality classification." *See* House Consideration of H. Res. 733 *reprinted in* LEGISLATIVE HISTORY OF THE CLEAN AIR ACT OF 1977, Vol. 3 at 326 (Aug. 4, 1977) (emphasis added).

Moreover, EPA retained the 1974 regulatory definition of "Indian reservation" following enactment of the 1977 Amendments. Had Congress disagreed with EPA's decision to so define the scope of tribal redesignation authority, it would have so indicated at the time it used the term "reservation" in enacting the "treatment as states" provisions in 1990. It did not do so.

The D.C. Circuit's finding that Congress had no discernible intent with respect to its use of the term "reservation" in the CAA is tantamount to its concluding that Congress gave EPA *discretion* to determine what lands tribes

could redesignate, even though redesignation allows tribes to control the activities of non-Indians on non-Indian lands. Petitioners are unaware of any prior instance in which a court has permitted the demarcation of state and tribal jurisdiction over non-Indians to be delegated to a federal administrative agency. Indeed, given the presumption under federal Indian jurisprudence that, absent a clear expression of congressional intent, tribes have no jurisdiction over the activities of non-Indians on non-Indian lands located *within* reservation boundaries, the court's conclusion that EPA has discretion to determine the scope of the boundaries themselves – and then to allow for tribal regulation outside of those boundaries – is a striking result.[13]

Even assuming that EPA could be said to have some discretion to define "reservation" for CAA purposes, the D.C. Circuit was still wrong when it found that EPA could "reasonably" interpret the term to include off-reservation lands taken into trust pursuant to IRA § 5. In light of the extraordinary extraterritorial effects attendant to a tribe's exercise of its authority to redesignate reservation lands to Class I under the CAA, and the implications which redesignation has with respect to the activities of non-Indians on non-Indian lands, EPA's construction of the term "reservation" to include lands which have been, or which one day might be, taken into trust through the exercise of

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[13] If this result is striking, then the D.C. Circuit's further conclusion that tribes are authorized by the "treatment as states" provisions to redesignate lands located *outside* reservation boundaries is inexplicable. According to the court, all that CAA § 164(c) "establishes . . . is the exclusive power of Indian tribes to redesignate land within a reservation; it does not address the inherent power of tribes to redesignate land in non-reservation areas." 211 F.3d at 1295, App. 27a. What the court overlooks, however, is that CAA § 164(a) unambiguously reserves to the states the exclusive authority to redesignate all lands other than reservation lands.

unreviewable discretion by the Secretary of the Interior raises serious constitutional problems. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 574-75 (1988) (*Chevron* deference must give way "where an otherwise acceptable construction of a statute would raise serious constitutional problems.").

The D.C. Circuit spoke approvingly of EPA's having "supported its interpretation of 'reservation' by looking to relevant case law," in particular "Supreme Court precedent holding that there is no relevant distinction between tribal trust land and reservations for the purpose of tribal sovereign immunity." 211 F.3d at 1294, citing *Oklahoma Tax Comm'n v. Citizen Band, Potawatomi*, 498 U.S. 505 (1991); *U.S. v. John*, 437 U.S. 634 (1978), App.25a. But EPA's reliance on these precedents as support for the TAR's definition of "reservation" is misplaced, as is the D.C. Circuit's confidence that cases such as *Potawatomi* and *John* establish the "reasonableness" of EPA's exercise of the "discretion" the Agency supposedly possesses.

In each of three cases in which this Court has opined that trust lands, never formally declared to be "reservations," nonetheless constituted *de facto* or "informal" reservation lands, none of the lands in question were lands that had been taken into trust by the Secretary of the Interior pursuant to IRA § 5. Rather, the trust lands at issue had taken into trust at either the express direction of Congress (*John* and *Potawatomi*) or by treaty (*Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114 (1993)).

In other words, like formal reservations, the trust lands at issue in the Supreme Court cases on which EPA and the D.C. Circuit placed such reliance had originally been set apart for the benefit of the tribes in question through direct congressional and Presidential action. *This Court has yet to resolve whether lands that are taken into trust pursuant to administrative action of the Secretary of the Interior under*

§ 5 of the IRA would similarly constitute a de facto or "informal" reservation.

The distinction between (i) lands placed into trust pursuant to treaties, Executive Orders, or specific acts of Congress, and (ii) lands taken into trust by the Secretary of the Interior exercising unreviewable authority under IRA § 5 is critically important to the case at hand. It is one thing for Congress to extend to tribes under the CAA the authority to redesignate lands previously set aside for their benefit pursuant to action by Congress and the President, action for which there is direct political accountability. It is another thing for Congress to establish an elastic redesignation power under which the lands that can be redesignated by tribes may be expanded without limitation through actions of the Secretary of the Interior that are committed to his discretion.

Given that "treaty reservations" and "Executive Order reservations" were all created before the 1977 CAA Amendments (*see* note 6, *supra*), Congress, by restricting tribal redesignations to lands within reservations established by Act of Congress, treaty, or Executive Order, ensured that the lands that states could redesignate, and the lands that tribes could redesignate, were specifically identified at the time the CAA was amended in 1977, and that those lands could not be changed except by further act of Congress. Where new reservations might be established after 1977 through act of Congress, concerns over the redesignation of those new reservations could be addressed in conjunction with the legislative process itself.

It is an altogether different matter, however, to construe the CAA as authorizing tribes to redesignate off-reservation lands taken into trust under IRA § 5. There being no constraints on the discretion of the Secretary of the Interior to take lands into trust, there would be no check on the tribes' gaining ever-expanding power over the activities of non-Indians on non-Indian lands. Review by this Court of this expansion of tribal jurisdiction to redesignate outside

established formal reservations is thus imperative, if a constitutionally-sound balance between state and tribal authority under the CAA is to be restored.

Finally, review is necessary to resolve the conflict created by the D.C. Circuit's holding with the prior decision of the U.S. Court of Appeals for the Ninth Circuit in *Arizona v. EPA*, 151 F.3d 1205 (9th Cir. 1998), *as amended*, 170 F.3d 870 (1999). In *Arizona v. EPA*, the Ninth Circuit addressed a challenge to the decision by EPA to approve the redesignation to Class I of five parcels of land by the Yavapai-Apache Tribe. Among other things, the petitioners in that case argued that four of the parcels in question, while held in trust by the U.S. government for the benefit of the Tribe, did not constitute lands within the exterior boundaries of a "reservation" within the meaning of CAA § 164(c).

In response to this argument, the Ninth Circuit found that there was "insufficient evidence in the record to support a finding that these parcels have been declared to be reservations by Act of Congress," or that the parcels "have been added to the Middle Verde reservation [*i.e.*, the one parcel which, the petitioners had conceded, was a formally-established "reservation"] by proclamation of the Secretary of the Interior pursuant to the Indian Reorganization Act." *Arizona*, 151 F.3d at 1210-11. The court thus rejected EPA's position that the trust status of the parcels *alone* was sufficient for their being considered "reservation" lands under the CAA. Accordingly, the court remanded to EPA to "determine whether the parcels are reservations for purposes of 42 U.S.C. § 7474(c)," should the Agency re-promulgate its redesignation decision (which had been rejected by the court on other grounds). *Id.* at 1211, *as amended,* 170 F.3d at 870.

Although Petitioners here had directed the D.C. Circuit's attention to the Ninth Circuit's decision in *Arizona v. EPA*, the D.C. Circuit failed even to acknowledge the existence of the case. The D.C. Circuit's finding that EPA's definition of "reservation" was a "reasonable" interpretation

of the CAA cannot be reconciled with the Ninth Circuit's determination that trust status alone is insufficient to deem lands located outside the exterior boundaries of formally-established reservations as being "reservations" within the meaning of CAA § 164(c).

II. This Court Should Resolve Whether the CAA Can Be Construed as Delegating to Tribes Authority to Regulate Air Resources on Non-Indian Fee Lands, Given That the CAA Expressly Precludes States Being Divested of Authority Over Lands Otherwise Within Their Jurisdiction.

This case for the first time presents the question whether the language of the CAA speaks with the clarity required by this Court for Congress to delegate to tribes the authority to regulate the conduct of non-Indians on fee lands within reservation boundaries. As the D.C. Circuit itself acknowledged, there have been historically "few examples of congressional delegation of authority to tribes." 211 F.3d at 1288, App. 12a. The uncommon nature of the event, and the resulting displacement of state sovereignty that flows from a judicial determination that Congress has intended to delegate to tribes authority over lands previously within the jurisdiction of a state, provide compelling reasons for this Court to review the D.C. Circuit's determination. This is particularly true given that the plain language of the CAA precludes the Act's being construed in such fashion.

From its inception in 1970, the CAA has never operated to remove from a state the authority that the state might otherwise possess under its own laws to regulate air emissions from sources located within such state. Specifically, CAA §116, entitled "Retention of state authority," provides, in pertinent part, that, except as otherwise provided in certain sections of the Act not relevant here, "*nothing in this [Act] shall preclude or deny* the right of

any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution" (emphasis added).

By its plain terms, this provision precludes the "treatment as states" provisions from constituting an express delegation to tribes of regulatory authority over non-Indian fee lands within reservation boundaries. To construe the 1990 CAA Amendments as giving tribes authority to regulate on non-Indian fee lands is to find that the Amendments took that same authority *away* from those states that previously exercised jurisdiction over such lands. The Act cannot be so construed, as CAA § 116 makes clear.

Even if CAA §116 did not itself preclude the interpretation which EPA, and the D.C. Circuit, have given to the "treatment of states" provisions, the conclusion that those provisions constitute an "express delegation" cannot be supported. In the first place, it is no small irony that the CAA does not even treat *states* in the manner in which the TAR treats tribes "as states." That is, the Act has never been understood as granting to states regulatory authority over sources within their boundaries that states could not otherwise regulate under state law.[14] The D.C. Circuit never explained how, in light of this, a statutory provision by which Congress affords EPA discretion to treat tribes "as states" can possibly be read as giving tribes authority they otherwise lack.

Moreover, the specific language of the "treatment as states" provisions in which the panel majority pinpointed the

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[14] Rather, in those circumstances where a state cannot, pursuant to state law, adopt a regulatory program that meets the Act's requirements, EPA will refuse to approve that program and will itself adopt an Agency-administered program in its place. *See* CAA §§ 110(c); 110(a)(2)(E) (program must be enforceable under state law).

supposed "express delegation" simply does not support that conclusion, as Judge Ginsburg in his dissent succinctly explained. 211 F.2d at 1302-04, App. 43a-48a. According to Judge Ginsburg, there "is *no way* to read the phrase deemed crucial" by the panel majority "as an express delegation." *Id.* at 1302 (emphasis added), App. 44a.

It is not often that a federal statute is construed as expressly delegating authority to tribes, thereby divesting states of authority over lands previously within their jurisdiction. Where, as here, that rare result has been reached by a panel of the U.S. Court of Appeals which could not even reach agreement as to how Congress supposedly effectuated that result, there is a compelling need for this Court's review.

Finally, underscoring the importance of review, the Ninth Circuit, in recently establishing what it terms a "clear statement rule" for ascertaining whether a statute expressly delegates authority to tribes, has explicitly adopted the reasoning employed by Judge Ginsburg in his dissent. The significance of the Ninth Circuit's decision lies not only in the fact that it conflicts with the approach taken by the panel majority in *Arizona Public Service Co.*, but that the Ninth Circuit has embraced an approach that is itself subject to misapplication.

In *Bugenig v. Hoopa Valley Tribe*, No. 99-15654, 2000 WL 1459373 (9th Cir. (Cal.) Oct. 3, 2000), the Ninth Circuit addressed the question whether the Hoopa-Yurok Settlement Act of 1988 expressly granted to the Hoopa Valley Tribe authority over a particular parcel of reservation land which was owned in fee by a non-Indian. At issue was a statutory provision which the district court had interpreted as constituting a "congressional delegation of authority to the Tribe to exercise" jurisdiction over the land in question. *Id.* at *3. The Ninth Circuit reversed.

In so doing, the Ninth Circuit cited what it termed the "delegations of congressional authority to Indian tribes that have been recognized by the Supreme Court," noting that

each of these other statutory provisions, "employ[ed] the same standard language to achieve delegation," *i.e.* by giving Indian tribes authority over all land within the geographical boundaries of the reservation, "notwithstanding the issuance of any patent." *Id.* at *5. "This recognized delegation language," the Ninth Circuit observed, was "conspicuously absent from the Settlement Act section relied upon by the Tribe." *Id.*

In terms of "evaluating the significance of this omission," the Ninth Circuit continued, it found "highly persuasive the treatment of a similar omission in statutory language" by Judge Ginsburg in his dissent in *Arizona Public Service Co. Bugenig*, *id.* at *6. Taking note that Judge Ginsburg had termed the "notwithstanding the issuance of any patent" proviso the "gold standard" for express delegations, the Ninth Circuit found it "appropriate to adopt in this context a 'clear statement rule.'" *Bugenig*, *id.* at *6, *7. "If Congress uses the 'notwithstanding proviso,'" the Ninth Circuit said, it will find that an "appropriate delegation has been made." *Id.* at *7. Where, on the other hand, the Ninth Circuit concluded, a "tribe claims that some other statutory language represents a conferral of jurisdiction," such alternative language "must, on its face, represent a pellucid delegation of the claimed authority." *Id.*

Applying this "clear statement rule," the Ninth Circuit would disagree with the panel majority in the decision below that the language of CAA § 301(d)(2)(B) constitutes a delegation of authority to tribes. The delegation which the majority found to be "implied" by that provision hardly satisfies the Ninth Circuit's requirement that alternative delegation language be "pellucid."

The Ninth Circuit has failed to appreciate, however, that Judge Ginsburg's own misapplication of the "gold standard" proviso in fact led him to the wrong conclusion regarding the effect of that provision in CAA § 110(o). As was previously noted, the proposition that *any* portion of the

Act delegates to tribes authority they otherwise lack over non-Indian fee lands within the jurisdiction of states is refuted by CAA § 116, which ensures that states retain whatever authority they might possess over such lands.

Judge Ginsburg's flawed account as to the effect of the "notwithstanding" proviso in CAA § 110(o) illustrates the dangers inherent in an automatic application of the Ninth Circuit's newly-minted "clear statement rule." Review by this Court is necessary in order to forestall the Ninth Circuit and other Circuits from reading more into the "notwithstanding" proviso than Congress, in a given statutory context, intended.

CONCLUSION

For the foregoing reasons Petitioners respectfully request that this petition for a writ of certiorari be granted.

Respectfully submitted,

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